

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2007-286-WS

IN RE: Application of Utilities Services of South Carolina, Incorporated for Adjustment of Rates and Charges and Modifications to Certain Terms and Conditions for the Provision of Water and Sewer Service))	PETITION FOR REHEARING AND/OR RECONSIDERATION
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The Office of Regulatory Staff (“ORS”), pursuant to S.C. Code Ann. §§ 58-5-330 and 1-23-310, et seq. (as amended) and 26 S.C. Ann. Regs. 103-825 and 103-854 (Supp. 2010), requests that the Public Service Commission of South Carolina (“Commission”) grant rehearing and/or reconsideration of Order No. 2011-363, issued on May 27, 2011 in the above-referenced docket. ORS received the Order on May 27, 2011. In support of this Petition, ORS states as follows:

1. In its opinion, *Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff*, Op. No. 26952, 2011 WL 1118731 (March 28, 2011), the Supreme Court (the “Court”) reversed the Commission’s final order and remanded the case to the Commission for further proceedings. Unless expressly directed to do otherwise by the Court, the Commission should make a ruling in this case based on the facts and evidence already contained in the record.¹

¹ The Court has previously held that “[u] nless this Court provides for the taking of additional evidence, no party may afford itself two bites at the apple. It was improper for the Commission to consider additional evidence.” Piedmont Natural Gas Company, Inc. v. Hamm, 301 S.C. 50, 54 389 S.E2d 655, 657 (1990) citing Parker II, 288 S.C. at 307, 342 S.E2d at 405.

2. ORS requests that the Commission reconsider its Order 2011-363 wherein the Commission allows Utilities Services of South Carolina, Incorporated (“USSC”) to supplement the existing record. ORS respectfully submits that the Commission should adopt ORS’s proposed order as the best resolution of this matter and that to allow additional evidence does not comply with the Court’s Order.
3. Whether the Court’s direction is reverse and remand for “further proceedings” or “further consideration”, ORS respectfully submits that without express direction, which *was* provided for in Hilton Head, the Commission should not entertain additional evidence not already contained in the record. (Hilton Head Plantation Utilities, Inc., v. Public Service Comm’n of S.C., 312 S.C. 488, 452, 441.S.E2d 321, 323 (1994), holding that “[t]he Commission may receive other evidence as it be advised.”) Unlike the Hilton Head case an express direction “to receive other evidence” is missing from the Court’s Order.
4. As an alternative, should the Commission deny ORS’s request for reconsideration of Order No. 2011-363 and allow new evidence to be introduced, we ask that the Commission schedule a contested case hearing in compliance with S.C. Code Ann. § 1-23-320 (Supp. 2010), regarding the testimony which the Commission has requested from USSC.
5. The right of cross-examination is a fundamental right derived from the due process protections of S.C. Const. Ann. Art. I, Section 3². S.C. Const. Ann. Art. I, Section 22 requires notice and an opportunity to be heard:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both

² The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

6. In *Spartanburg v. Parris*, 251 S.C. 187, 191, 161 S.E.2d 228, 229 (S.C. 1968), the Court found in an administrative hearing regarding the discharge of respondent, a former police officer, that the admission of an affidavit and the denial of the officer's right to cross-examine his accuser was error requiring the reversal of the order of the Civil Service Commission. The Court relied in part on the following in reaching its decision to exclude the affidavit and require a rehearing:

The right to cross examine witnesses in quasi-judicial or adjudicatory proceedings is a right of fundamental importance which, in regard to serious matters, exists even in the absence of express statutory provision, as a requirement of due process of law or the right to a hearing, and no one may be deprived of such right in an area in which the Constitution would permit it if there is no explicit authorization therefore. 2 Am. Jur. 234, Administrative Law, Sec. 424.

Id. at 191, 161 S.E.2d at 229.

(See, *Southern Stevedoring Co. v. Voris*, (5th Cir.) 190 F. (2d) 275, 277 the substantial rights of the parties must be preserved; it is generally held that these rights include a reasonable opportunity to cross-examine the important witnesses against a party when their credibility is challenged). See also Stono River Environmental Protection Association v. SCDHEC, 305 S.C. 90, 406 S.E.2d 340 (1991) wherein the South Carolina Supreme Court determined that intervenors were entitled to notice and the opportunity to be heard.

7. The Commission should not establish a precedent whereby a party may, via verified testimony, introduce evidence into the record that has not withstood the rigors of objection or cross-examination. If Order No. 2011-363 is permitted to stand, a precedent will be established for those cases remanded to the Commission where the Commission

permits the introduction of new evidence that has not been subject to objection or cross-examination. ORS respectfully submits that any new or additional documentation or testimony offered for inclusion into the record should be subject to objection or cross-examination and comply with the rules of evidence pursuant to S.C. Code Ann. § 1-23-330.³

WHEREFORE, for the reasons stated in this petition, ORS requests that the Commission reconsider and adopt ORS's proposed order in lieu of allowing the introduction of additional evidence into the record. In the alternative, if the Commission allows the introduction of additional evidence, ORS requests the Commission establish pre-filed testimony and hearing dates such that ORS may have the opportunity to object to or cross-examine any documentation or testimony offered.

Respectfully submitted,



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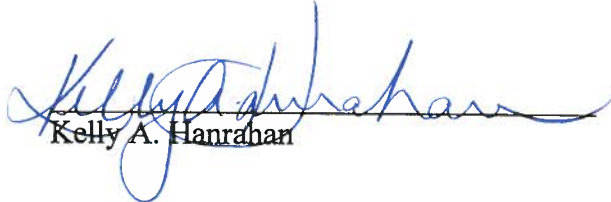
³ S.C. Code Ann. § 1-23-320(i). *See also* § 1-23-330(1), "Except in proceedings before the Industrial Commission, the rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed."

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2007-286-WS

IN RE:)	
Petition of the Office of Regulatory Staff for a)	CERTIFICATE OF
Declaratory Order Against Nature's Development,)	SERVICE
Inc. Requiring Certification as a Water/ Sewer)	
Utility and the Posting of a Performance Bond)	

This is to certify that I, Kelly A. Hanrahan, an employee with the Office of Regulatory Staff, have this date served one (1) copy of the **PETITION FOR REHEARING AND/OR RECONSIDERATION** in the above-referenced matter to the person(s) named below by causing said copy to be deposited in the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below:

John M.S. Hoefer, Counsel
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Kelly A. Hanrahan

June 16, 2011
Columbia, South Carolina